FILED BY CLERK
OCT -1 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

TUCSON GOOD EGGS, INC.; TABER COLLINS and BEVERLY COLLINS, husband and wife, Petitioners, v. HON. STEPHEN C. VILLARREAL, Judge of the Superior Court of the State of Arizona, in and for the County of Pima, Respondent, and MANUEL A. LOPEZ, Real Party in Interest.	2 CA-SA 2008-0054 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION PROCEEDING

Pima County Cause No. C-20083049

JURISDICTION ACCEPTED IN PART AND DENIED IN PART;
RELIEF GRANTED

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Real Party in Interest in Propria Persona

B R A M M E R, Judge.

¶1 Tucson Good Eggs, Inc., and Taber and Beverly Collins (collectively "Collins") filed a petition for special action relief challenging the respondent judge's denial of Collins's motion to dismiss the complaint real party in interest Manuel Lopez had filed against them and their alternative motion to strike portions of that complaint. For the following reasons, we decline jurisdiction in part, accept jurisdiction in part, and grant relief.

Background

¶2 Before Lopez filed his complaint, he apparently had filed a charge of discrimination with the Civil Rights Division of the Arizona Department of Law ("Division"), *see* A.R.S. §§ 41-1401, 41-1471, asserting discrimination in a place of public accommodation pursuant to A.R.S. § 41-1442. The parties subsequently took part in a mediation process offered by the Division, but failed to settle the charge. Lopez then sued Collins alleging discrimination under § 41-1442. The allegations in paragraphs fifteen through thirty of the complaint relate exclusively to those mediation proceedings.

¶3 Collins contended in the motion to dismiss that the complaint's allegations regarding the mediation constituted a breach of the confidentiality afforded to mediation

proceedings by A.R.S. § 12-2238 and warranted dismissal of the complaint with prejudice. Alternatively, Collins requested those allegations be stricken from the complaint, arguing they placed Collins in a "Catch-22" of having to choose between waiving confidentiality by responding to the allegations or leaving them unanswered. Collins also asserted that Lopez had failed to state a claim upon which relief could be granted because "conditions precedent" to filing a lawsuit under § 41-1471 had not yet occurred. Specifically, Collins maintained that the Division had not yet completed its investigation of the charge Lopez had filed against The Good Eggs, Inc., and "there [was] no evidence that a charge was ever filed with the Division against Taber and Beverly Collins." Finally, Collins argued that Lopez had failed to state a claim against the Collinses in their individual capacity, noting Lopez had "not allege[d] that they individually discriminated against him at the restaurant" or that they "were the [Good Eggs, Inc.'s] alter ego or business conduit . . . such that they would be liable for corporate debts."

¶4 The respondent judge denied Collins's motion finding that, because § 41-1471 contains no "right-to-sue-letter requirement" for filing a lawsuit alleging discrimination in a place of public accommodation, Collins's argument that the conditions precedent to Lopez's action had not yet occurred was "without merit." The respondent judge further found no basis to dismiss Lopez's complaint based on a breach of confidentiality, stating that § 12-2238(B) merely precludes discovery or evidentiary use of confidential materials and communications. The respondent judge also denied Collins's motion for reconsideration of

his refusal to strike certain of the allegations of the complaint and the respondent judge's refusal to dismiss Taber and Beverly Collins as defendants in their individual capacity. The respondent judge noted that Collins "may file a motion for summary judgment on the issue of the Collins's individual liability when the appropriate discovery is complete."

Jurisdiction

¶5 "An order denying a motion to dismiss is an interlocutory, nonappealable order. Nevertheless, an appellate court should accept jurisdiction of a special action challenging the denial of a motion to dismiss only in limited circumstances." *Qwest Corp. v. Kelly*, 204 Ariz. 25, ¶ 3, 59 P.3d 789, 791 (App. 2002) (citations omitted). "[W]e follow a general policy of declining jurisdiction when relief by special action is sought to obtain review of orders denying motions to dismiss." *Citizen Publ'g Co. v. Miller*, 210 Ariz. 513, ¶ 7, 115 P.3d 107, 110 (2005); *see also Van Herreweghe v. Burke*, 201 Ariz. 387, ¶ 4, 36 P.3d 65, 67 (App. 2001) (same). However, special action jurisdiction is appropriate under exceptional circumstances, such as when a petition presents an issue of first impression, a purely legal question, or one of statewide importance that is likely to recur. *Van Herreweghe*, 201 Ariz. 387, ¶ 4, 36 P.3d at 67.

¶6 With respect to most of the issues raised in Collins's special action petition, we find no exceptional circumstances sufficient to warrant our acceptance of jurisdiction. Although Collins's argument regarding statutory conditions precedent to filing a discrimination complaint involves a legal issue of statutory interpretation, it also involves

threshold issues of fact as to whether Lopez filed a charge against Taber and Beverly Collins or whether the charge he filed with the Division against Tucson Good Eggs was sufficient to constitute a charge against the Collinses. Likewise, issues of fact remain regarding allegations, if any, of the Collinses' personal liability. As the respondent judge noted, such issues may properly be raised through a motion for summary judgment. Moreover, Collins has an adequate remedy by appeal to challenge the denial of a motion to dismiss. *See* Ariz. R. P. Spec. Actions 1(a) (special action not available "when there is an equally plain, speedy, and adequate remedy by appeal"). Accordingly, we decline jurisdiction of the portions of Collins's petition concerning conditions precedent and failure to state a claim.

¶7 But appeal does not provide an adequate remedy for the respondent judge's denial of Collins's alternative motion to strike portions of the complaint. The motion was based on Collins's contention that the relevant portion of the complaint alleged matters subject to a statutory privilege against disclosure. "'Because an appeal offers no adequate remedy for the prior disclosure of privileged information, special action jurisdiction is proper to determine a question of privilege." *Catrone v. Miles*, 215 Ariz. 446, ¶ 8, 160 P.3d 1204, 1208 (App. 2007), *quoting Sun Health Corp. v. Myers*, 205 Ariz. 315, ¶ 2, 70 P.3d 444, 446 (App. 2003). We therefore accept jurisdiction of only that portion of Collins's petition challenging the respondent judge's denial of the motion to strike paragraphs fifteen through thirty of the complaint. Because we conclude the respondent judge abused his discretion by

refusing to strike the relevant portions of the complaint, we grant relief. *See* Ariz. R. P. Spec. Actions 3(c).

Discussion

¶8 "Upon motion made by a party before responding to a pleading . . . the court may order stricken from a pleading any . . . immaterial, impertinent, or scandalous matter." Ariz. R. Civ. P. 12(f). "Denial of a motion to strike falls within the sound discretion of the trial court, and we review for an abuse of that discretion." *Birth Hope Adoption Agency, Inc. v. Doe*, 190 Ariz. 285, 287, 947 P.2d 859, 861 (App. 1997). We find such an abuse by the respondent judge here because the matter contained in the paragraphs of Lopez's complaint at issue is not only immaterial and likely "scandalous," but it also concerns confidential or privileged materials and communications. Furthermore, the respondent judge's refusal to strike those allegations arguably forces Collins to either waive or violate the statutory privilege or confidentiality by responding to them or risk admitting them by leaving them unanswered. *See* Ariz. R. Civ. P. 8(d) (averments not denied are admitted); *cf. Stone v. Ariz. Highway Comm'n*, 93 Ariz. 384, 395, 381 P.2d 107, 114 (1963) (granting motion to strike appropriate when allegations have no relation to subject matter of action and movant shows prejudice), *overruled on other grounds by Grimm v. Ariz. Bd. of Pardons & Paroles*, 115 Ariz. 260, 564 P.2d 1227 (1977).

¶9 As noted above, paragraphs fifteen through thirty of the complaint contain allegations related exclusively to the mediation proceedings before the Division on Lopez's

discrimination charge. Absent specific, statutory exceptions that are not applicable here,[1] "[c]ommunications made, materials created for or used and acts occurring during a mediation are confidential," and they may not be discovered or admitted into evidence. § 12-2238(B). Thus, all of the allegations contained in paragraphs fifteen through thirty are immaterial to the claim Lopez has asserted in the complaint. Lopez argues that Collins has "no grounds to claim" that the information alleged in those paragraphs concerns privileged or confidential matter because the mediation was not court-ordered nor was a "Confidentiality Agreement Form" signed for one of the three alleged mediation sessions. But the plain language of § 12-2238(A) and (F) refutes this contention. Subsection (A) recognizes that "[b]efore or after the filing of a complaint, mediation may occur pursuant to law, a court order or a voluntary decision of the parties," and subsection (F) provides: "For the purposes of this section, 'mediation' means a process in which parties who are involved in a dispute enter into one or more private settlement discussions outside of a formal court proceeding with a neutral third party to try to resolve the dispute." The mediation alleged in Lopez's complaint, even though not court-ordered, clearly falls within this definition. The absence of a signed confidentiality form did not render the mediation proceedings any less confidential.

[1]Lopez argues in passing that the allegations in his complaint are exempt from the mediation privilege pursuant to § 12-2238(D). That section provides that "threatened or actual violence that occurs during a mediation is not a privileged communication" and therefore may be disclosed. None of the allegations in Lopez's complaint concerning the mediation sessions, however, can reasonably be construed as alleging "threatened or actual violence."

¶10 The respondent judge denied Collins's motion to dismiss because § 12-2238 does not provide for that remedy, noting Lopez "d[id] not yet seek to admit evidence from the mediation session[s]." But the respondent judge articulated no reason for denying Collins's alternative motion to strike paragraphs fifteen through thirty of the complaint. Given the potential for prejudice to Collins, we conclude the respondent judge abused his discretion by refusing to strike those paragraphs of Lopez's complaint.

Disposition

¶11 We vacate that portion of the respondent judge's order denying the motion to strike and direct the respondent judge to enter an order striking paragraphs fifteen through thirty of Lopez's complaint. The respondent judge retains discretion to determine whether to place the complaint or other matters containing information pertinent to the mediation under seal.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

GARYE L. VÁSQUEZ, Judge